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The Neighborhood House Association and Service Employees International Union, Local 2028.¹
Case 21–CA–35986

June 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On June 15, 2004, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a cross-exception and an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

This case presents two issues: first, whether the Respondent violated Section 8(a)(5) and (1) of the Act by withholding a regularly scheduled cost-of-living increase (COLA) from its unit employees; second, whether the Respondent violated Section 8(a)(5) and (1) of the Act by proposing a 2.2-percent COLA increase and then conditioning implementation of that proposed COLA on the Union's waiving its right to bargain further over the COLA amount.

Contrary to the judge and our dissenting colleague, we find, as explained below, that the principles set forth in *Stone Container Corp.*, 313 NLRB 336 (1993), and *TXU Electric Co.*, 343 NLRB No. 132 (2004), dispose of both issues. Because the COLA constituted a discrete event that was scheduled to recur during negotiations for an initial contract, the Respondent was free to implement its proposal so long as the Respondent provided the Union with reasonable advance notice and an opportunity to bargain. The Respondent met this obligation. Accord-

ingly, we find that the Respondent did not violate Section 8(a)(5) and (1), and we dismiss the complaint.

I. BACKGROUND

The Respondent is a nonprofit multipurpose human service agency located in San Diego, California. It provides social services to the community including a Head Start program funded through a grant from the Federal Government. The Respondent applies for and receives this grant once every 3 years. The Federal Government also allocates an increase to the grant for each fiscal year, which the Respondent, subject to Federal Government approval, determines how to spend.

The Respondent's past practice, dating back 5 years, was to grant an annual COLA increase to its employees. Depending on the Federal Government's approval of the Respondent's proposed allocation of its annual grant increase, employees' COLA increases during this period ranged from 2.2 to 3.6 percent. For 2003, the Federal Government approved the Respondent's allocation of its annual grant increase to fund a 2.2-percent COLA for its employees.

On March 7, 2003,³ the NLRB certified the Union as the collective-bargaining representative for separate units of the Respondent's professional and nonprofessional Head Start employees. The Respondent and the Union commenced bargaining for an initial contract in June. The Union's initial proposal included a 3.0-percent COLA. In mid-July, the Respondent made a counterproposal that included a 2.2-percent COLA.

Apart from their respective COLA proposals, each party made a proposal for an additional wage increase. The Union proposed a 7.5-percent across-the-board wage increase for all bargaining unit employees, retroactive to July 1, 2002. The Respondent proposed a 2.5-percent wage step increase tied to performance.

The parties next discussed the COLA issue at the October 14 bargaining session. At this session, the Union proposed that the Respondent implement the 2.2-percent COLA, but reserved the right to continue to bargain for the additional COLA amount included in its proposal. The Respondent replied that it would not implement the 2.2-percent COLA until the Union agreed that the implementation would close the COLA issue for that year.

The parties did not communicate further regarding the COLA issue until December. In a letter to the Union dated December 10, the Respondent adhered to its bargaining position and again sought the Union's agreement to resolve the issue by consenting to the immediate implementation of a 2.2-percent COLA. The Respondent stated that if the Union did not consent, it would only

¹ We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ All subsequent dates are in 2003, unless otherwise indicated.

implement the COLA for nonbargaining unit employees. The Union replied by letter dated December 12, reiterating its prior bargaining position that it would not object to immediate implementation of the proposed 2.2-percent COLA, but would insist on additional bargaining on wages and “future COLA payments.” By letter of December 16, the Respondent notified the Union that it would not implement the COLA for bargaining unit employees because the Union was not willing to reach a complete and final agreement on the COLA issue. Consistent with its bargaining position, the Respondent, on December 18, implemented the 2.2-percent COLA for its nonbargaining unit employees and withheld the COLA from unit employees.

II. DISCUSSION

The judge found that the Respondent had an established practice of implementing a COLA increase in December of each year, and that it violated Section 8(a)(5) and (1) by withholding the regularly scheduled COLA increase from bargaining unit employees. The judge also found that the Respondent violated Section 8(a)(5) and (1) by conditioning implementation of the COLA increase on the Union’s waiver of its right to negotiate an addition to the COLA.

The Respondent excepts to these findings on the ground, *inter alia*, that its actions were lawful under the principles of *Stone Container Corp.*, *supra*, and *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998).⁴ We agree.

⁴ In *Stone Container*, the employer had an established practice of conducting an annual wage and benefit survey and implementing an increase, if appropriate, each April. The union was certified in July 1988. During negotiations for a first contract in March 1989, the parties discussed the April increase and the employer informed the union that it would not grant an increase that year due to economic reasons. The employer made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal and did not raise the issue again during negotiations. Reasoning that the annual wage review was a discrete, recurrent event, and that negotiations over the amount of any such April increase could not await overall impasse, the Board concluded that the employer satisfied its bargaining obligation by providing the union with notice and an opportunity to bargain. The Board stressed that, as in the instant case, the employer did not decline to bargain over how much, if any increase it would give, and did not propose elimination of the annual wage review practice. It simply made a decision as to the specific annual wage increase at issue, and provided the union sufficient opportunity to bargain over that subject.

In *Alltel Kentucky*, the employer told the union during bargaining that, based on a wage survey it had conducted, it would not increase employees’ wages in January as it had done annually for the previous several years. Referring to *Stone Container*, the Board noted that overall bargaining impasse was not a condition precedent to a change in a term or condition of employment where the change concerned a discrete event scheduled to occur during bargaining. The Board adopted the judge’s finding that the wage increase was a discrete event and that the employer satisfied its bargaining obligation by giving notice to the

A. The Respondent Satisfied Its Bargaining Obligation

As a general rule, where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse.⁵ However, as explained more fully in our recent decision in *TXU Electric Co.*, *supra*,⁶ the Board in *Stone Container*, *supra*, set forth an exception to the general rule. Under this exception, if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice. *TXU Electric*, *supra*, slip op. at 2–3; see also *Stone Container*, *supra* at 336, and *Alltel Kentucky*, 326 NLRB at 1350 fn. 4.

Contrary to the judge and our dissenting colleague, we find that the *Stone Container* exception governs here. The COLA increase constituted a discrete recurring event that was scheduled to occur during bargaining for an initial contract. The Respondent provided the Union with ample advance notice of, and an opportunity to bargain over, its position on a COLA increase for 2003. The Respondent first proposed a 2.2-percent COLA in July. In October, the Respondent proposed to implement the 2.2-percent COLA only if the Union agreed that implementation would close the COLA issue for that year. Thus, the Respondent proposed a COLA of 2.2 percent if

union and an opportunity to bargain over its proposal to freeze wages that year.

⁵ *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enfd.* Mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Chairman Battista notes that an “overall impasse” does not require an impasse on each and every issue. In his view, if there is an impasse on major issues, the mere fact that there may be flexibility on minor issues (e.g., use of bulletin boards) would not preclude a finding of “overall impasse.”

⁶ In *TXU Electric*, the employer had a past practice of annually reviewing its salary plan to determine if adjustments were necessary. During bargaining for an initial contract, the employer notified the union that it intended to maintain the current salary plan for unit employees unless the parties reached an agreement on a change to the plan. The union did not object to the employer’s statement or request bargaining. Thereafter, consistent with its past practice, the employer reviewed its salary plan, adopted a revised plan, and increased the salaries of only its non-unit employees. The Board, applying the rationale of *Stone Container* and *Alltel Kentucky*, found that the employer did not violate the Act by changing its past practice of annual salary plan adjustments for unit employees while it negotiated with the union for an initial contract. The Board found that where a discrete event occurs every year at a given time, and that negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event, as long as the union is given notice and an opportunity to bargain as to those matters.

the Union agreed to it, or no COLA in December if the Union did not agree. In December, the Respondent reiterated its proposal to immediately implement the 2.2-percent COLA only if the Union would close the COLA issue for that year. Having thus satisfied its bargaining obligation under *Stone Container*, the Respondent was privileged to implement its proposal, i.e., to withhold in December the COLA increase from bargaining unit employees, when the Union did not agree that the COLA for 2003 would be 2.2 percent.⁷ Accordingly, the Respondent did not violate Section 8(a)(5) and (1) by withholding the COLA increase from its bargaining unit employees.⁸

Our dissenting colleague argues that *Stone Container*, *Alltel Kentucky*, and *TXU Electric* do not support our finding that the Respondent's actions in this case were lawful. Specifically, the dissent argues that, unlike the unions in those cases, the Union here expressly protested the Respondent's plan to implement the COLA for unit employees if the Union agreed to finalize the COLA term. The dissent also observes that, unlike the situations in *Stone Container* and *Alltel Kentucky*, the Re-

spondent's decision here not to grant the COLA to the unit employees was not prompted by economic considerations.

However, the factual distinctions cited by the dissent were not the basis for the Board's holding in *TXU Electric*.⁹ As the Board's decision makes clear, the core issue in *TXU Electric* was whether a change in a term or condition of employment related to a discrete recurring event "would be permissible if the union had notice and opportunity to bargain" about the change.¹⁰ *TXU Electric*, supra, slip op. at 3. To that end, the Board in *TXU Electric* specifically indicated that it agreed with the view of the concurring members in *Daily News of Los Angeles*, 315 NLRB 1236 (1994), aff'd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997), that:

where, as here, a discrete event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event. "[T]he employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year." As long as the union is given notice and opportunity to bargain as to those matters, the employer can carry out the changes even if there is no overall impasse as of the time of the change. [*Id.*, slip op. at 4.]

That is what happened here. The COLA increase was a discrete recurring event that was scheduled to occur while negotiations for a first contract were underway. The Respondent gave the Union notice of its plan to make a change in that event, i.e., to implement a 2.2-percent COLA increase only if the Union agreed that this would close the COLA issue. The Respondent also gave the Union an opportunity to bargain. Therefore, as in *TXU Electric*, we find that the Respondent did not violate the Act when it "declined to [grant the COLA increase] to unit employees during negotiations for a collective-bargaining agreement." *Id.*, slip op. at 3.

⁷ The fact that a December increase would have been retroactively effective to July does not alter the *Stone Container* analysis. Further, it should be noted that there is no allegation that the Respondent's proposal was made in bad faith.

⁸ Our dissenting colleague relies on *Lee's Summit Hospital & Health Midwest*, 338 NLRB 841 (2003), to support his argument that the Respondent violated Sec. 8(a)(5) and (1) by withholding the COLA increase from its bargaining unit employees.

Chairman Battista finds that *Lee's Summit Hospital*, 338 NLRB 841 (2003), is distinguishable. In *Lee's* the employer had a past practice of granting a general wage adjustment to employees each fall. Following the union's April 2000 certification, the employer announced on September 19, 2000, that unit employees would not receive the annual wage adjustment that it was granting its nonunit employees on October 2. When the union protested the withholding of the increase during the next bargaining session on September 25, the employer's chief negotiator responded that she would recommend that the unit employees be given the wage increase on October 2 if the union was willing to agree that this increase would constitute the total first year's increase under the contract. When the union did not agree, the employer withheld the wage increase. Under these circumstances, unlike here, the employer did not provide reasonable advance notice and an opportunity to bargain about its intended departure from past practice. By contrast, in the instant case, the Respondent made its offer to the Union in October, and the conduct did not occur until December. Chairman Battista thus concludes that a reasonable opportunity for bargaining was given. He does not read *Lee's Summit* as holding that an impasse has to be reached before implementation in circumstances where, as here, there has been a reasonable opportunity to bargain.

Member Schaumber agrees there are factual distinctions between this case and *Lee's Summit Hospital*, but also finds that, to the extent that *Lee's Summit Hospital* can be read as suggesting that an employer must bargain to overall impasse before changing a discrete, recurrent term or condition of employment while negotiations for an initial contract are underway, that principle does not survive *TXU Electric Co.*, 343 NLRB No. 132 (2004).

⁹ Similarly, the Board's decision in *TXU Electric* explained that the holdings in *Alltel Kentucky* and *Stone Container* are not limited to the particular situations cited by the dissent. See *TXU Electric*, slip op. at 4 (recognizing the different factual settings in *Alltel Kentucky* and *Stone Container*, but finding those cases to stand for the "broader proposition" applied herein).

¹⁰ Indeed, the dissent in *TXU Electric* characterized the holding as allowing employers to unilaterally change "annual wage adjustment programs merely because a wage increase is scheduled to occur during the course of bargaining." *Id.*, slip op. 5-6.

B. The Respondent did not Adopt a “Take-It-Or-Leave-It” Position

The judge also found that the Respondent violated Section 8(a)(5) and (1) by conditioning implementation of the COLA increase on the Union’s waiver of its right to negotiate an addition to the COLA. Contrary to the judge and our dissenting colleague, we find the Respondent’s actions lawful under our recent decision in *TXU Electric*, supra.

As explained above, under *TXU Electric*, the respondent was free to implement its proposal regarding the COLA increase if it provided the union with reasonable advance notice and an opportunity to bargain about the intended change. Here, the Respondent adopted a bargaining position entirely consistent with that standard. The Respondent notified the Union that it intended to depart from its past practice of granting a COLA increase and would withhold the COLA from bargaining unit employees in December if the Union did not agree to finalize the COLA term.

Thus, we find that the Respondent bargained in good faith over the amount of the COLA increase. The Respondent did not take the COLA issue “off the table” or refuse to bargain about the issue during contract negotiations. It did not communicate to the Union that it would refuse to entertain counterproposals on the COLA issue. Nor did the Respondent propose to eliminate its past practice of assessing COLAs on an annual basis. Rather, the Respondent proposed to implement its 2003 COLA increase proposal only if the Union agreed to finalize the term. Otherwise, the Respondent would withhold the COLA increase and continue to bargain over the amount of the increase. The Respondent’s bargaining position was entirely consistent with good-faith bargaining.¹¹

Hydrotherm, Inc., 302 NLRB 990 (1991), upon which the judge and our dissenting colleague rely to find the Respondent’s bargaining position unlawful, is distinguishable. In that case, the complaint alleged that the Respondent engaged in surface bargaining during the parties’ negotiations. The judge found that the respondent’s overall behavior exceeded lawful “hard bargaining” and instead demonstrated bad faith. *Id.* at 993. The Board agreed with the judge, finding that the “totality of the positions” taken by the respondent during bargaining and the manner in which the respondent advanced those positions were inconsistent with a good-faith approach to negotiations. *Id.* at 994. The Board found that the re-

spondent’s dealings with both the union and its employees regarding wages were an example of its overall bad-faith bargaining. In negotiations, the employer took the bargaining position that it would continue its past practice of an annual merit increase if, and only if, the union agreed to forgo all bargaining over wages for the coming year. The Board adopted the judge’s finding that the employer’s position with respect to wages amounted to a “take-it-or-leave-it” proposal. In addition, the employer compounded its bad faith by falsely portraying the union’s position on wages in a letter to employees. The employer’s conduct regarding wages, together with the many other indicia of bad faith found by the Board, established the surface-bargaining violation.

Our dissenting colleague argues that the situation in *Hydrotherm* is “precisely” the situation in the instant case and is therefore controlling. Here, however, the Respondent did not make the broad proposals that the Board in *Hydrotherm* relied upon to infer that the respondent in that case had bargained in bad faith. Moreover, there is no allegation or evidence of bad-faith or surface bargaining by the Respondent. Finally, the Respondent did not condition implementation of the COLA increase on the Union’s agreement to forgo all bargaining over wages. Negotiations continued between the parties over their other wage proposals, including the Union’s proposal for a 7.5-percent general wage increase and the Respondent’s proposal for a 2.5-percent wage step increase. Indeed, the Respondent did not condition implementation of COLA on the Union’s foregoing COLA increases for the duration of the contract. It did so only with respect to 1 year. In sum, the Respondent did not bargain in bad faith with respect to wages or COLA.¹² Rather, the Respondent conditioned implementation only on the Union’s agreement to finalize the COLA term for 2003. Also, unlike the employer in *Hydrotherm*, the Respondent did not misrepresent the Union’s bargaining position in communications with employees. Therefore, we dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by conditioning implementation of the COLA on the Union’s waiver of its right to negotiate an additional COLA.

¹¹ Cf. *TXU Electric*, 343 NLRB No. 132, slip op. at 4 (finding that an employer had acted “entirely consistent with good faith bargaining” when it gave notice that it would depart from its past practice of performing an annual wage review unless and until the parties agreed otherwise).

¹² In *Hydrotherm*, in contrast, the Board found the employer’s bargaining tactic unlawful because “it stated that the scheduled wage increases would be granted only if the Union agreed to put forward no counter-proposal *whatsoever*.” *Hydrotherm*, supra, 302 NLRB at 995 (emphasis added).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 30, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

Based on well-established legal principles, the Respondent violated Section 8(a)(5) and (1) of the Act (a) by conditioning the implementation of the scheduled 2003 2.2-percent COLA for unit employees on the Union's waiving its right to continue to negotiate, after that implementation, for an additional .8 percent of COLA, and (b) (after the Union refused to waive its negotiating right) by unilaterally withholding the scheduled 2.2-percent COLA from the unit employees.

A. Facts

My colleagues have set forth the facts about the annual COLAs and about the parties' negotiations over the total amount of the 2003 COLA for the unit employees. The Respondent's established practice of implementing scheduled annual COLA wage increases had become an established term and condition of employment. In addition to the oral and written negotiations about the COLA summarized by my colleagues, there was a September 2003 conversation between Union Executive Director Mary Grillo and Respondent Executive Vice President Regina Evans.¹ The Union was seeking an overall 3-percent COLA, and the Respondent was offering the scheduled 2.2-percent COLA. Evans told Grillo that the Respondent was going to implement the scheduled 2.2-percent COLA. Grillo replied that the Respondent had an obligation to discuss with the Union any changes in wages, hours, and other terms and conditions of employment. Evans asked Grillo if the Union did not want the Respondent to implement the scheduled 2.2-percent COLA for the unit employees. Grillo replied that the Union never stood in the way of wage increases, but the Respondent was still obligated to discuss wages with the Union.

Not only did the Union expressly not oppose implementation of the scheduled 2.2-percent COLA for the unit employees in this September conversation, but in an

October 14 bargaining session the Union made it clear to the Respondent that the Union would accept that COLA. The Respondent told the Union during this session that the Respondent was planning to implement the scheduled 2.2-percent COLA prior to the Christmas holidays. The Union replied that the Union expected the COLA to be implemented as it had been implemented in prior years. Indeed, the Union then insisted that the scheduled 2.2-percent COLA be implemented while the parties continued to bargain about the additional .8 percent of COLA that the Union was still seeking. The Respondent would not agree to that. The Respondent would only agree to implement the scheduled 2.2-percent COLA for the unit employees if the Union would agree not to attempt to obtain an additional .8 percent of COLA in subsequent negotiations. The Union would not agree to that.²

The parties held to these respective positions throughout the negotiations. Finally, on December 18, the Respondent implemented the scheduled 2.2-percent COLA for nonunit employees. But the Respondent unilaterally withheld the COLA from the unit employees, expressly because the Union would not agree to give up its attempts to get an additional .8 percent of COLA in subsequent negotiations.

B. Analysis and Conclusions

1. Conditioning the scheduled COLA on a union waiver

In finding that the Respondent violated Section 8(a)(5) and (1) of the Act by conditioning the implementation of the scheduled 2003 2.2-percent COLA for unit employees on the Union's waiving its right to continue to negotiate, after that implementation, for an additional .8 percent of COLA, the judge correctly relied on *Hydrotherm, Inc.*,³ which is squarely on point and which dictates the result on this issue. The employer in *Hydrotherm* violated Section 8(a)(5) when it refused to implement its established past practice of granting scheduled annual merit wage increases for selected employees, unless the union agreed not to pursue negotiations for a general wage increase for all employees. The union did not oppose the granting of the scheduled annual merit wage increases. It merely sought to pursue its right to negotiate in addition for a general wage increase that would

¹ All dates are 2003, unless stated otherwise.

² My colleagues state that the Respondent proposed a COLA of 2.2 percent for the unit employees if the Union agreed to it, or no COLA "in December" if the Union did not agree. In fact, because any COLA would have been retroactive to July 1, the start of the Respondent's fiscal year, the Respondent's demand effectively gave the Union the choice either to (1) accept the 2.2-percent FY 2003–2004 COLA for the unit employees and forego bargaining about the Union's request for an additional .8 percent, or (2) forego any COLA for all of FY 2003–2004.

³ 302 NLRB 990 (1991).

also benefit employees who were not selected for a merit increase. While the employer lawfully could have proposed to the union that wages would be limited to the scheduled merit increases, it unlawfully held to the position that the scheduled merit wage increases would be granted only if the union agreed to put forward no counterproposal at all on wages.⁴

As the judge found, the situation in *Hydrotherm* is precisely the situation here. The Respondent repeatedly told the Union that the price of the Respondent implementing the scheduled 2.2-percent COLA was the Union waiving its right to thereafter negotiate for the additional .8 percent of COLA. But the Respondent could have lawfully implemented the scheduled 2.2-percent COLA for the unit employees while continuing to negotiate about the Union's proposal for an additional .8 percent. In short, as the judge found, the Respondent unlawfully withheld an established benefit as a bargaining tactic.⁵

2. Unilaterally withholding the scheduled COLA

In finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withholding the scheduled 2003 2.2-percent COLA from the unit employees, the judge correctly relied on *Lee's Summit Hospital & Health Midwest*,⁶ which, like *Hydrotherm* in the preceding discussion, is squarely on point and which dictates the result on this issue. The employer in *Lee's Summit Hospital* violated Section 8(a)(5) when it unilaterally withheld an annual wage adjustment that had become, over the years, an established condition of employment

that the employer was not free to change unilaterally. As in *Lee's Summit Hospital*, so also here, the annual COLA had become an established condition of employment that the Respondent was not free to change unilaterally, and the Respondent violated the Act when it unlawfully withheld the 2003 COLA from the unit employees.⁷

3. The majority's dismissal of the complaint

The well-established and longstanding general rule (with two exceptions not applicable here) prior to *TXU Electric Co.*,⁸ was that during negotiations for a collective-bargaining agreement, an employer must maintain the status quo with regard to all mandatory subjects of bargaining unless the parties have reached overall impasse in bargaining for the agreement as a whole.⁹ During such negotiations, an employer's duty to refrain from making unilateral changes extends beyond the mere duty to give the union notice and opportunity to bargain about a proposed change, and encompasses the duty to refrain from implementing such a change at all unless and until the parties have reached overall impasse in bargaining for the agreement as a whole.¹⁰

In nevertheless finding that the Respondent did not violate the Act here, my colleagues rely on *TXU Electric Co.*, supra, *Stone Container Corp.*,¹¹ and *Alltel Kentucky*.¹² For the reasons fully set forth in my dissent in *TXU*, I find that case was wrongly decided. But in any event, *TXU*, *Stone Container Corp.*, and *Alltel Kentucky* are all inapposite here.

⁴ Id. at 995–996.

⁵ My colleagues' attempt to distinguish *Hydrotherm* is not well founded. First, they note that the employer in that case, unlike the Respondent here, was found to have engaged in overall bad-faith bargaining and to have falsely portrayed the union's bargaining position in a letter to employees. These are red herrings. There is nothing in the Board's decision in *Hydrotherm* that shows that the employer's conditioning implementation of its scheduled annual merit increases for selected employees on the union's agreement not to pursue negotiations for a general wage increase for all employees would not have been found unlawful even outside the context of overall bad-faith bargaining or even in the absence of a false portrayal of the union's position. Second, my colleagues argue that while the employer in *Hydrotherm* conditioned implementation of its established past practice of granting scheduled annual merit wage increases on the union's waiver of its right to negotiate about wages in general, the Respondent here did not condition implementation of the scheduled 2.2-percent COLA on the Union waiving its right to pursue negotiations over wages in general, but only the additional .8 percent of COLA in particular. But the Union here had as much right to negotiate about an additional .8 percent of COLA following implementation of the scheduled 2.2-percent COLA as the union in *Hydrotherm* had a right to negotiate about additional wages increase in general beyond the scheduled annual merit wage increases. In both cases, the employers unlawfully conditioned implementation of scheduled increases on the unions' waiver of their rights to bargain about additional increases.

⁶ 338 NLRB 841 (2003).

⁷ The Chairman's attempt to distinguish *Lee's Summit Hospital*, supra, is unfounded. He argues that the reason the employer in that case violated the Act was because it withheld the annual wage adjustment from the unit employees without first providing the union with reasonable advance notice and an opportunity to bargain about it. But that was not the reason the Board found the employer violated the Act in that case. In fact, neither the Board nor the judge even mentioned such a theory. Instead, the Board based its finding of a violation on the fact that "the wage adjustment had become an established pattern and practice over many years, and therefore constituted a condition of employment that the Respondent was not free to change unilaterally." Id. at 841 fn. 3. Moreover, at the same time that the employer announced to the union that it was withholding the annual wage adjustment from the unit employees, the employer nevertheless did offer to bargain about wages for the unit employees. Notwithstanding the employer's offer to bargain, the Board found that the employer violated the Act by unilaterally withholding the annual wage adjustment from the unit employees.

⁸ 343 NLRB No. 132 (2004).

⁹ *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1566 (10th Cir. 1993), enfg. 305 NLRB 783 (1991).

¹⁰ *Bottom Line Enterprises*, supra, 302 NLRB at 374; *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995).

¹¹ 313 NLRB 336 (1993).

¹² 326 NLRB 1350 (1998).

In *TXU*, the employer had an established 22-year past practice of conducting annual wage reviews in December and giving annual wage increases in January based on those reviews. During bargaining for an initial collective-bargaining agreement, however, the employer twice told the union that the employer was not going to give increases unless and until the parties bargained to agreement on such a change. The union did not at any time object to the employer's position or request bargaining about it. Consistent with its past practice, the employer adopted a revised salary structure and increased salaries—but this time only for nonunit employees. The employer withheld the increases from the unit employees.

Nevertheless, the majority in *TXU* found that the employer did not violate the Act. The majority stated:

The Respondent gave the Union ample time in advance of the December wage event to request bargaining. Having been twice notified of the Respondent's decision not to adjust unit employees' wages in December, it was incumbent on the Union to request bargaining over that decision. [Citing *Alltel Kentucky*, supra.] Yet, the Union did not do so either time the decision was announced. Thus, under the rationale of *Stone Container* and *Alltel Kentucky*, we find that the Respondent did not violate the Act when the Respondent declined to apply the 2000 salary plan to unit employees during negotiations for a collective-bargaining agreement.¹³

But unlike in *TXU*, the Union here expressly protested the Respondent's plan to withhold the scheduled COLA from the unit employees unless the Union agreed to waive its right to bargain for additional COLA. Additionally, in subsequent negotiating correspondence the Union expressly declared its intention to continue negotiations on wages and future COLA payments during negotiations and expressly reserved its right to do so. Thus, in addition to disagreeing with the reasoning and result in *TXU*, I find in any event that it is inapposite and does not support my colleagues' dismissal of the complaint.¹⁴

¹³ *TXU Electric*, supra, slip op. at 3.

¹⁴ My colleagues assert that the above facts that distinguish *TXU* from the instant case were not the basis for the result in *TXU*. First, the above-quoted passage from *TXU* belies that assertion. Additionally, the Board in *TXU* stated in the very preamble to its decision that it agreed with the judge under the circumstances of that case that the employer did not unlawfully change its past practice of annual salary plan adjustments while negotiating with the union for an initial contract "because the [employer] gave sufficient notice to the [u]nion of the proposed change and the [u]nion declined to request bargaining over it." Id., slip op. at 1. Finally, the Board ended its decision on the same note:

Stone Container, supra, and *Alltel Kentucky*, supra, also relied upon by my colleagues, are also inapposite here. In *Stone Container*, the employer notified the newly-certified union that for *economic reasons* it could not grant the annually scheduled wage increase that was scheduled to occur while the parties were negotiating for an initial collective-bargaining agreement. The Board found that because the employer gave the union enough time to bargain over the employer's decision not to give the scheduled increase, and because the union made no counterproposals concerning the scheduled increase and did not raise the issue during negotiations, the employer had satisfied its bargaining obligation regarding the scheduled annual wage increase and did not violate the Act by unilaterally not giving it.¹⁵

In *Alltel Kentucky*, like in *Stone Container*, the employer told the union during bargaining for an initial collective-bargaining agreement that based on a *wage survey* conducted by the employer showing that the employer's wage scale was higher than the average for the surveyed area, the employer did not intend to grant the annual COLA wage increase that was scheduled to occur while the parties were negotiating for an initial collective-bargaining agreement. The Board found that, having been notified of the employer's intention not to give the scheduled annual increase, it was incumbent upon the union to request bargaining over the employer's decision. The union failed to do so. Citing *Stone Container*, the Board found that the union's failure to request bargaining in the face of the employer's notice to the union that it did not intend to give the annually scheduled COLA wage increase defeated any claim that the employer unlawfully discontinued the increase.

In the instant case, however, unlike in *Stone Container* and *Alltel Kentucky*, the Respondent's decision not to grant the scheduled 2.2-percent COLA to the unit employees was not prompted by economic considerations, but was the consequence of the Respondent's negotiating

Under *Stone Container* and *Alltel*, the Respondent, having twice notified the Union of its intention to maintain the 1999 salary plan, afforded the Union ample opportunity to bargain on this particular subject. The Union failed to request bargaining at any point during the intervening 6 months. *Having received no response from the Union*, the Respondent was not required to wait until the parties reached an overall impasse in negotiations before implementing the change in annual salary plans. [Id. at 4–5 [emphasis added].]

Thus, the union's failure to request bargaining in *TXU* was an express, significant factor in the Board's dismissal of the complaint, and it distinguishes that case from this one, where the union repeatedly demanded that the Respondent bargain with it about any changes in wages.

¹⁵ The *TXU* majority agreed with this view of *Stone Container*: "Under these circumstances, since the union did not request bargaining when notice was afforded to it, the Board determined that the employer could lawfully decline to grant the wage increase." Supra, slip op. at 2.

tactic of refusing to grant the scheduled 2.2-percent COLA for the unit employees unless the Union waived its right to bargain for an additional .8 percent of COLA after implementation of the scheduled COLA. And also unlike the unions in *Stone Container* and *Alltel Kentucky*, the Union here expressly protested the Respondent's plan to withhold the scheduled COLA from the unit employees unless the Union agreed to waive its right to bargain for additional COLA, and in subsequent negotiating correspondence the Union expressly declared its intention to continue negotiations on wages and future COLA payments during negotiations and expressly reserved its right to do so.

In sum, I find, for the reasons set forth in the *TXU* dissent, that case was wrongly decided, that my colleagues' reliance on *TXU*, *Stone Container*, and *Alltell*, supra, is in any event unavailing, and that their attempts to distinguish *Hydrotherm* and *Lee's Summit Hospital*, supra, are unsuccessful. I would adopt the judge's unfair labor practice findings.

Dated, Washington, D.C. June 30, 2006

Dennis P. Walsh,

Member

NATIONAL LABOR RELATIONS BOARD

Robert MacKay, for the General Counsel.

Christopher W. Carlton and *Dave Carothers, Esqs.*, of San Diego, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at San Diego, California, on April 28, 2004, upon the General Counsel's complaint (amended at the hearing) which alleged principally that the Respondent unilaterally changed an established working condition of granting a cost of living increase (COLA) to employees by withholding implementation of an approved COLA and thus violated Section 8(a)(5) of the National Labor Relations Act (the Act).

The Respondent generally denied that it committed the unfair labor practices alleged, and affirmatively contends the COLA approved was a subject of negotiations and the parties have been unable to agree to the amount of the COLA.

Upon the entire record, including my observation of the witnesses, briefs¹ and arguments of counsel, I make the following

¹ Counsel for the General Counsel filed a motion to strike posthearing brief of Respondent, on grounds that the Respondent's brief was hand delivered to my office on the brief due date but counsel for the General Counsel was not notified of this by telephone as, he asserts, is required by Sec. 102.114 of the Board Rules and Regulations. While there may have been technical noncompliance on the part of counsel for the Respondent, I cannot conceive how such would any way prejudice the

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

At all material times, the Respondent has been a California 501(c)(3) nonprofit corporation engaged in providing social welfare services with offices and facilities throughout San Diego County, California. In the course of its operations, the Respondent annually derives gross revenues in excess of \$250,000 and annually purchases and receives at its San Diego County locations, goods, products, and materials valued in excess of \$50,000 from enterprises which had received such goods, products and materials directly from points outside the State of California. At all material times, the Respondent has been an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union, Local 2028, AFL-CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The essential material facts here are not in dispute. The Respondent is engaged in providing a variety of social services in the San Diego area, including the Federally funded Head Start program. In providing these services the Respondent employs professionals, nonprofessionals, and others.

On March 7, 2003,² the Union was certified as the exclusive bargaining representative in separate units of Head Start employees—one of professionals and the other of nonprofessionals. The parties began negotiations for a collective-bargaining agreement in early summer and to the date of the hearing here have had numerous bargaining sessions but have not reached an agreement.

Every 3 years, the Respondent applies for and has received a Federally funded grant to operate the Head Start program. Each year the Federal grant includes a cost-of-living (COLA) increase. The Respondent determines how this COLA will be allocated, but must apply for permission to use it such manner. Upon receiving permission, the Respondent then grants a COLA to its Head Start employees. For the past 5 years, the COLA increases have been: 2002–2003, 3.5 percent; 2001–2002, 3.5 percent 2000–2001, 3.6 percent; 1999–2000, 2.2 percent; and, 1998–1999, 3.1 percent.

General Counsel. Counsel for the General Counsel contends that his brief was mailed on June 1, 2004, and "General Counsel's timely filed brief was in Respondent's possession before Respondent filed its brief." This is pure speculation and is probably not accurate. The General Counsel's brief would certainly not have been delivered to the Respondent's San Diego office before June 2, yet the Respondent's brief is date stamped in my San Francisco office on June 2. Indeed, counsel for the General Counsel's brief is date stamped June 3, though he asserts he mailed it to me and to counsel for the Respondent on June 1. I overrule the General Counsel's motion and have considered the briefs of both counsel.

² All dates are in 2003, unless otherwise indicated.

For fiscal year 2003–2004, the Federal grant was for a COLA of 1.5 percent; however, the Respondent determined to use it all for wages which would amount to a 2.2-percent COLA for each employee. The Respondent submitted its proposed COLA in the spring received approval in the fall to allocate the COLA at 2.2 percent for employee wages, retroactive to July 1—the actual implementation to be accomplished by the December holidays.

Mary Grillo is the executive director for the Union, and the Union’s chief negotiator. She testified that in September she had a telephone conversation with Regina Evans, the Respondent’s executive vice president and chief operating officer, during which Evans said that the Respondent “was going to proceed to implement the COLA. And I informed her that now that the Union has been recognized they have to discuss any changes to wages, benefits and working conditions.” And: “So she asked me if I didn’t want the COLA implemented and I stated that, of course, we never stand in the way of increasing workers’ wages but that she is obligated to discuss these matters with the Union.”

Evans denied that she and Grillo discussed the proposed COLA in September (though agreeing they had a phone conversation then); however, she testified that in May or June they had a phone conversation during which “I also informed Ms. Grillo that we had an approved cost of living adjustment from the Federal government” Since the proposed 2.2 percent was not approved by the Federal administrators until fall, I conclude that the discussion wherein Evans said the Respondent intended to implement it must have taken place in September. That it had not been implemented was discussed at the October 4 session. Perhaps in May or June, Evans had informed Grillo that the Respondent had applied for approval of 2.2 percent. And in the Union’s first contract proposal, presented in June, a COLA of 3 percent was proposed, which the Union acknowledges was the 2.2 plus .8 percent, in addition to a 7.5-percent wage increase. In its initial proposal, submitted in June or July, the Respondent offered a 2.2-percent COLA plus a 2.5-percent wage step increase.

There followed bargaining sessions, particularly one on October 14, wherein the Union asked that the 2.2 percent be granted and the remaining .8 percent be left to negotiations. But for Grillo’s initial statement to Evans that the Respondent could not implement the COLA absent bargaining, the Union has taken the position that the Respondent should implement the 2.2 percent and the parties would continue to bargain over the remaining .8 percent (as well as other items). The Respondent has repeatedly argued that it would only implement the 2.2 percent if the Union would agree that such would end discussion of the COLA. These respective positions are memorialized in a series of letters between the Respondent and the Union, the relevant portions of which:

December 10, Evans to Grillo:

At this point, we believe that it would be unfair to our employees if we did not implement the COLA before the end of December. To prevent this inequity, we need to implement the COLA for all eligible Head Start employees in time to include all retroactive pay (for the period

July 1, 2003, to present) in the paychecks that will be distributed on December 18, 2003. Accordingly, regardless of whether it is obligated to do so, NHA is requesting SEIU Local 2028 to bring closure to this issue by consenting to the immediate implementation of the 2.2% COLA for the bargaining unit employees. If SEIU Local 2028 is unwilling to consent to implementation of the budgeted COLA for bargaining unit employees, NHA will have no choice but to implement the COLA for non-bargaining unit employees only.

December 12, Grillo to Evans:

SEIU Local 2028 has no objection to your immediate implementation of the 2.2% COLA retroactive to July 1, 2003 for bargaining unit employees. * * * SEIU Local wants to make it clear that by consenting to the immediate implementation of the COLA that it is not agreeing that the issue of wages is closed. Nor is the issue of future COLA payments closed. SEIU Local 2028 intends to continue negotiations on these issues and we specifically reserve the right to do so.

December 16, Evans to Grillo:

(Referring to Grillo’s December 12 letter) you indicated that SEIU Local 2028 would consent to NHA’s implementation of its budgeted COLA of 2.2% but only if the Union could continue to negotiate for a larger COLA. This is not an acceptable or fair bargaining tactic. The Agency is not willing to implement a COLA unless and until the parties have reached a complete and final agreement on this issue. As a result, NHA will not be implementing the budgeted COLA for the bargaining unit at this time.

Memo December 18, Evans to employees:

I must point out that the agency had also hoped to implement the 2.2% COLA for eligible team members in the bargaining units represented by SEIU Local 2028, but the Union has not yet agreed to accept this COLA. Instead, SEIU Local 2028 is demanding a 3.0% COLA. In fact, the agency offered to implement the 2.2% COLA for the bargaining units employees if the Union would agree to drop its demand for a 3.0% COLA, but the Union would not agree to do so. We continue to negotiate in good faith with SEIU Local 2028 about the 2003-2004 COLA (as well as the other terms for a labor contract), and we will do our best to promptly implement whatever COLA is finally negotiated with the Union for the bargaining units.

B. Analysis and Concluding Findings

Although there are some minor disputes about what was said concerning the 2003–2004 COLA and when, they are irrelevant to the material issues here. There is no doubt that implementing a COLA had become an established practice upon the Federal administrator of the Head Start program designating a COLA for the fiscal year. While the amount of the COLA is discretionary and must be approved before implementation, the fact of a COLA is, and has been, a fixed working condition.

On facts similar to those here, the Board recently said:

In adopting the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally withholding the 2000 annual wage adjustment, we also adopt his finding that the wage adjustment had become an established pattern and practice over many years, and therefore constituted a condition of employment that the Respondent was not free to change unilaterally. [*Lee's Summit Hospital and Health Midwest*, 338 NLRB 841 fn. 3 (2003).]

Similarly, in *Hydrotherm, Inc.*, 302 NLRB 990 (1991), the Board found a violation of 8(a)(5) when the company refused to implement its past practice of granting annual merit wage increases unless the union agreed not to pursue negotiations for a general wage increase. The Board noted that the company was free to propose that wages would be limited to the scheduled merit increases, or even propose less. "It was not acting in good faith, however, when it stated that the scheduled wage increases would be granted only if the [u]nion agreed to put forward no counter-proposal whatsoever."

Such is precisely the situation here. The Respondent repeatedly told the Union that the price of implementing the approved COLA of 2.2 percent was foregoing any further negotiations of a COLA. In short, the Respondent withheld an established benefit as a bargaining tactic. By this act it violated Section 8(a)(5) notwithstanding that the matter of implementing the COLA had been discussed in negotiation sessions. The Respondent certainly could have implemented the 2.2-percent COLA without agreeing to the Union's proposal for an additional .8 percent or indeed any other of the Union's proposals.

The Respondent relies on *Stone Container Corp.*, 313 NLRB 336 (1993), and *Alltel Kentucky Inc.*, 326 NLRB 1350 (1998), in arguing that refusing to implement the COLA in these circumstances was not violative of the Act. In *Stone Container*, the company informed the union that it would not be granting a wage increase (which it had for several years) due to economic reasons. However, the company did not refuse to bargain about this refusal. And in *Alltel Kentucky*, there was no violation of Act when during negotiations for an initial contract the employer told the union of its intent to discontinue the past practice of granting cost-of-living increases.

In these, and similar cases, the company announced its intent to discontinue a past practice, and gave the union an opportunity to negotiate. Thus, the ultimate discontinuance was not unilateral and violative of the Act. Here, on the other hand, the Respondent did not suggest that it was intending to cease implementing a COLA for 2003–2004, or subsequent years. It was simply delaying implementation of the COLA until it received a favorable response from the Union concerning negotiations. The Respondent did not propose, nor was there discussion about, eliminating a past practice, as in *Stone Container* and *Alltel Kentucky*. The practice of granting a COLA approved by the Head Start administrator remained. Actually implementing it was contingent on the Union agreeing not to pursue any additional amount. Thus when the Respondent refused to implement the COLA by December, as had been the practice, it unilaterally changed a condition of employment.

On these facts I conclude that in December the Respondent unilaterally withheld implementation of the 2.2-percent COLA

for employees in both bargaining units and conditioned implementation of the COLA on the Union waiving its right to negotiate an addition to the COLA, all in violation of Section 8(a)(5) of the Act.

IV. REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act, including granting to each employee in the bargaining units backpay in the amount of 2.2 percent of their respective annual wage retroactive to July 1, 2003, with interest. Any employee terminated for any reason after July 1, 2003, will also be entitled to receive the COLA.

It appears, and I conclude, that the COLA issue has affected the overall ability of the Union to negotiate a collective-bargaining agreement in a timely fashion. Notwithstanding that the parties have had numerous bargaining sessions, I conclude that it is necessary to extend the certification year in order to give the Union a fair chance to negotiate a collective-bargaining agreement. *Mar Jac Poultry*, 136 NLRB 785 (1962).

On the foregoing findings of fact and conclusions of law, and the entire record in this matter, I issue the following recommendation³

ORDER

The Respondent, The Neighborhood House Association, San Diego, California, its officers agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with the Union concerning wages, hours and others terms and conditions of employment.

(b) Withholding implementation of the regularly scheduled COLA for bargaining unit employees.

(c) Conditioning implementation of the regularly scheduled COLA upon the Union waiving its right to bargain about additional COLAs.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the below described bargaining units concerning wages, hours, and other terms and conditions of employment and if an agreement is reached, embody that agreement in a signed contract, the union certification to be extended 1 year from the date the Respondent complies with this Order:

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Unit A:

All full-time and regular part-time nonprofessional Head Start employees, including associate teachers, cooks, food service workers, drivers, bus drivers, bus monitors, office assistants, custodians, teachers' aides, family services specialists, family services assistants, employed by the Respondent at all of its facilities and operation located in San Diego County, California; but excluding all other employees, professional employees, casual employees, family resource technicians, all employees located at 5660 Copley Drive, San Diego, California, team leader pay custodians, management analysts, administrative assistants, confidential employees, managerial employees, guards and supervisors as defined in the Act.

Unit B:

All full-time and regular part-time professional Head Start employees, including home visitors, family services advisors, Head Start Program advisors, Head Start Program specialists, master teachers, teachers and mentor teachers employed by the Respondent at all of its facilities and operations located at San Diego County, California; but excluding all other employees, non-professional employees, casual employees, management analysts, administrative assistants, family resource technicians, all employees located at 5660 Copley Drive, San Diego, California, confidential employees, managerial employees, guards and supervisors as defined in the Act.

(b) Implement a 2.2-percent COLA, retroactive to July 1, 2003, with interest, for all employees in units A and B, including those who have been terminated since July 1, 2003, to the date the Respondent complies with this Order.

(c) Within 14 days after service by the Region, post at its each of its facilities copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees of the Respondent at any time since July 1, 2003.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, San Francisco, California, June 15, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively and in good faith with the Union concerning wages, hours and others terms and conditions of employment for employee in the bargaining units covering professional and non-professional employees of the Head Start program.

WE WILL NOT withhold implementation of the regularly scheduled COLA for bargaining unit employees.

WE WILL NOT condition implementation of the regularly scheduled COLA upon the Union waiving its right to bargain about additional COLAs.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL implement a 2.2-percent COLA, retroactive to July 1, 2003, for all professional and nonprofessional employees of the Head Start program, with interest, including those who have been terminated since July 1, 2003.

THE NEIGHBORHOOD HOUSE ASSOCIATION